CRIMINAL YEAR SEMINAR

April 14, 2017 - Tucson, Arizona
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DUI UPDATES

Presented By:

The Honorable Crane McClennen

Maricopa County Superior Court (Retired)
Phoenix, Arizona

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ARIZONA DUI AND TRAFFIC LAW

JUDGE CRANE MCCLENNEN (RET.)

28–729(1) DRIVING WITHIN A SINGLE LANE.

***State v. Gutierrez*,** 240 Ariz. 460, 381 P.3d 254 (Ct. App. 2016).

- Officer saw Gutierrez twice apply brakes for no apparent reason and saw vehicle's right tires twice swerve across white fog line, and therefore stopped vehicle; Gutierrez contended he did not violate this statute.
- **.010** This section requires a person to drive a vehicle as nearly as practicable entirely within a single lane, thus a driver does not violate this section merely by allowing wheels on one side of a vehicle to pass over the line marking a lane and then returning to driving within the lane.

¶¶ 5–10 App. 2016) (court concluded officer did not stop defendant for violating A.R.S. § 28–729(1) or for swerving over fog line just once, but instead based stop on totality of driver's conduct, which trial court demonstrated reasonable likelihood that driver might be impaired).

28–925(C) TAIL LAMPS—LICENSE PLATE LAMP.

***State v. Kjolsrud*,** 239 Ariz. 319, 371 P.3d 647 (Ct. App. 2016).

- Officer stopped Kjolsrud's vehicle because license plate was not illuminated.
- **.010** A motor vehicle shall be equipped with a lamp that illuminates the rear license plate with a white light so that the license plate is visible from a distance of 50 feet.

¶¶ 2, 11 (parties agreed initial traffic stop was reasonable).

28–931(C)(2) LAMPS COLORS—LICENSE PLATE LIGHT.

***State v. Stoll*,** 239 Ariz. 292, 370 P.3d 1130 (Ct. App. 2016).

- Officer stopped Stoll's vehicle because white license plate light was visible from rear of vehicle.
- **.010** This statute provides that the light illuminating the license plate shall be white; nothing precludes that light from being visible from the rear of the vehicle.

¶¶ 1, 8–12 (court held officer did not have valid reason for the stop).

28–1323(A)(5) QUALITY ASSURANCE RECORDS.

***State v. Peraza*,** 239 Ariz. 140, 366 P.3d 1030 (Ct. App. 2016).

- **a.5.010** Under subsection (5), Quality Assurance Records are a necessary foundational predicate for admission of breath test results.

¶¶ 25–35 (instruction that periodic maintenance records provide prima facie evidence that device was in proper condition at time of test correctly states law and did not result in burden shifting).

28–1383(A)(4) DRIVING WITHOUT REQUIRED IGNITION INTERLOCK DEVICE.

***State v. James*,** 239 Ariz. 367, 372 P.3d 311 (Ct. App. 2016).

- Court had ordered James to install ignition interlock device once his driving privileges were reinstated; defendant's driving privileges had not been reinstated at time of offense, thus James contended he did not violate this statute.
- **.010** This section prohibits driving a vehicle without a court-ordered ignition interlock device.

¶ 6 (because James's driving privileges had not yet been reinstated, he was not violating this statute).

28–3511 REMOVAL AND IMMOBILIZATION OR IMPOUNDMENT OF VEHICLE.

***State v. Wasbotten*,** 239 Ariz. 492, 372 P.3d 1016 (Ct. App. 2016).

- Officer saw Daniels drive truck with Wasbotten as passenger; Daniels stopped truck and switch places with Wasbotten; after Wasbotten failed to stop at stop sign, officers stopped truck and discovered Daniels had suspended license; officer arrested Daniels, impounded truck, searched it, and found drugs.
- **.020** The use of the phrase "is driving" requires the driving occur while the person's license is suspended or revoked, and does not require driving at the moment of the actual stop by the officer.

¶¶ 9–10 (Ct. App. 2016) (because officer saw Daniels driving truck, officer had authority to impound and search truck even though Daniels was not driving truck at time of stop).

28–1321(A) IMPLIED CONSENT TO SUBMIT TO TEST.

***State v. Valenzuela*,** 239 Ariz. 299, 371 P.3d 627 (2016).

- Officer read Valenzuela the "admin per se" form, which stated "Arizona law requires you to submit to" a BAC test, and stressed this requirement three more times; Valenzuela submitted to breath and blood tests; at trial, Valenzuela contended he did not voluntarily submit to the tests.
- **.020** Informing a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance " makes any subsequent consent involuntary.

¶ 24 (court noted statute provides person after arrest shall be requested to submit to BAC test, but does not require person to do so).

***State v. Navarro*,** 241 Ariz. 19, 382 P.3d 1234 (Ct. App. 2016).

¶¶ 2–4 (because Navarro submitted to breath test, and because United States Supreme Court determined warrantless breath test is allowed as search incident to lawful DUI arrest, court did not have to address issue of nature of consent given).

VALENZUELA CONTINUED.

28–1321(B) Refusal to submit to test.

- **.020** Upon arresting a person for DUI, the officer should do the following: (1) ask the person whether the person will consent to a BAC test, and advise the person of the penalties set forth in § 28–1321(B)(1) and (2); (2) if the person expressly agrees and successfully completes the BAC test, the officer need not advise the person of the consequences of refusing; (3) if the person refuses to consent or fails to complete the test successfully, advise the person of the consequences as set forth in § 28–1321(B); (4) again ask the person whether the person will consent to a BAC test; (5) if the person again refuses to consent, the officer may not administer a test unless the officer obtains a warrant.

¶ 29 (2016) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

28–1321(C) IMPLIED CONSENT—PERSON DEAD, UNCONSCIOUS, OR OTHERWISE INCAPACITATED.

***State v. Havatone*,** 241 Ariz. 506, 389 P.3d 1251 (2017).

- Havatone was conscious at scene of collision, but was airlifted to hospital in Las Vegas; Havatone was unconscious at hospital; officer instructed Las Vegas officers to obtain blood sample.
- **.010** Blood may be taken from a dead, unconscious, or otherwise incapacitated person only if case-specific exigent circumstances exist.
- **.020** When police have probable cause to believe a suspect has committed a DUI, a nonconsensual blood draw is permissible if, under the totality of the circumstances, law enforcement officials reasonably determine they cannot obtain a warrant without a significant delay that would undermine the effectiveness of the testing.

¶¶ 13–17 (because state did not show any exigent circumstances, BAC results should have been suppressed).

28–1388(E) SAMPLE OF BLOOD, URINE, OR OTHER BODILY SUBSTANCE.

***State v. Nissley*,** 241 Ariz. 327, 387 P.3d 1256 (2017).

Nissley collided head-on into oncoming vehicle, injuring four persons in vehicle and killing pedestrian; defendant was very hostile and combative with medical personnel.

- **.010** To invoke the medical blood draw exception set forth in this section, the state must establish: (1) probable cause existed to believe the suspect was driving under the influence; (2) exigent circumstances made it impractical for law enforcement to obtain a warrant; (3) medical personnel drew the blood sample for medical reasons; and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.

Nissley at ¶¶ 10, 24.

NISSLEY CONTINUED

- **.020** The natural dissipation of alcohol in the bloodstream in not a *per se* exigent circumstance; the state must establish exigency by showing that, under the circumstances specific to the case, it was impractical to obtain a warrant.

¶¶ 11–12 (court disavows anything in *State v. Cocio,* 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985), to the contrary).

- **.030** Before the state may use as evidence a portion of a blood, urine, or other sample taken for medical purposes, the state is required to prove that (1) the suspect expressly or impliedly consented to medical treatment or (2) medical personnel acted when the suspect was incapable of directing his or her own medical treatment.

¶ 25 (court remanded for trial court to apply appropriate standards and determine whether law enforcement personnel lawfully obtained blood sample).

***State v. Peltz*,** 2017 WL 836570 (Ct. App. Mar. 2, 2017).

Peltz was injured in collision and transported to hospital; nurse informed officer that they would be drawing defendant's blood for medical purposes, and officer requested sample.

¶ 36 officer testified that, based on his training as "combat life saver in the military," he was aware of possibility of "intravenous applications of fluids," which would "alter an individual's blood alcohol concentration" and "essentially destroy whatever evidence was available"; thus state met its burden of showing exigent circumstances).

36–2811(C) PHYSICIAN IMMUNITY.

- ***State v. Gear*,** 239 Ariz. 343, 372 P.3d 287 (2016).

Despite never having done so, Gear certified that he had reviewed patient's medical records from preceding 12 months.

- **.010** Does not provide immunity from prosecution for a physician making false statements.

¶¶ 6–23 (court held AMMA did not immunize a physician from making false statements, thus trial court erred in dismissing forgery charges).

28–1381(A)(3) ANY ILLICIT DRUG IN THE PERSON'S BODY.

***Ishak v. McClennen*,** 241 Ariz. 364, 388 P.3d 1 (Ct. App. 2016).

Trial court precluded evidence that Ishak was a medical marijuana cardholder; state's expert testified that Ishak had 26.9 ng/ml of THC in his blood; trial court precluded expert from testifying whether that level "causes impairment in the person"; Ishak's expert testified there "is no consensus" about the concentration of THC that causes impairment; jurors acquitted Ishak of the (A)(1) charge, but convicted him of the (A)(3) charge.

- **.060** In order to prove a defendant guilty under § 28–1381(A)(3), the state must only prove the presence of a drug or metabolite in the person's body and does not have to prove the person was in fact impaired, thus the provision of the AMMA, A.R.S. § 36–2802(D), which provides immunity to being "under the influence of marijuana," does not immunize a medical marijuana cardholder from prosecution under § 28–1381(A)(3), but instead affords an affirmative defense if cardholder shows the marijuana or its metabolite was in a concentration insufficient to cause impairment.

ISHAK V. MCCLENNEN CONTINUED

¶ 12 Under *Dobson,* trial court erred in precluding evidence to support affirmative defense.

¶ 12 "As for Ishak's blood test results, the jury heard no testimony that the concentration of THC in Ishak's blood was sufficient to cause impairment in all persons, in most persons, or even that, to a reasonable degree of scientific certainty, it proved that Ishak was impaired."

¶ 12 "[T]he affirmative defense [under the AMMA] requires proof that he or she was not actually impaired, not whether, in the abstract, the same THC concentration could not impair any human being."

- **Rule 701. Opinion Testimony by Lay Witnesses.**
- **701.020** A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

¶ 18 Although state's expert testified sample of Ishak's blood showed 26.9 ng/ml of THC, court held lay person (including Ishak) could give opinion that defendant was not impaired by marijuana.

DISSENT

¶ 23. "[T]he issue is not whether the defendant was *actually* impaired by marijuana or its metabolite, but whether the marijuana or its metabolite in the defendant's blood was in a concentration in sufficient to cause impairment *generally*."

¶ 26. "In concluding that the second element of the defense is satisfied if the defendant merely shows that the THC or its metabolite did not actually impair him, the majority blurs the distinction between an (A)(1) prosecution and an (A)(3) prosecution."